110-238

OFFICE SUPREME COURT U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 198.

CHARLES P. CHOUTEAU ET AL

vs.

S. L. M. BARLOW ET AL.

Reply to Respondents' Brief.

I.

The respondents' counsel argue (p. 18) that because, as they say, the lands in Minnesota which are involved in this controversy were only worth about $3,500 at the time of the dissolution, "a mere trifle compared with the total assets of such a concern as the St. Louis firm;" that there would be nothing connected with the value of the property which would make improbable the arrangement contended for by them.

We should say that exactly the contrary inference would be drawn from these facts. It would seem to be manifestly improbable that in the settlement of the affairs of a firm, involving hundreds of thousands of dollars, the amount of the assets and liabilities of which were in a state of great perplexity and doubt, that Sanford would have asked that a certain amount of real estate should be excepted, in which his interest would have been of the value of about $600.

And this *intrinsic* improbability is rendered almost absolute, when we consider that the lands, now in controversy in this case, did not belong at all to the firm of P. Chouteau, Jr., & Co., No. 2, at the time of the dissolution, but were acquired by that firm, over two-and-a-half years after the dissolution, by a compromise and settlement with the Borup and Sibley outfits: which outfits constituted a subsidiary partnership, in which Borup and Sibley were interested to the extent of two-thirds of the profits. (See appellant's statement, pp. 25 to 29.) *The unquestionable fact is that these lands were acquired from Borup and Sibley in satisfaction and settlement of the very assets that complainants now contend were absolutely assigned by Sanford to Pierre Chouteau, Jr., at the time of the dissolution.*

Whoever owned the *assets* of firm No. 2 in liquidation must legally and equitably also own the lands that were acquired by the means of, and in return for, these very assets.

II.

It is also contended, (p. 19,) that because Sanford, in his lifetime, after the dissolution, joined in a power of attorney authorizing Prince to sell lands owned by the firm in Minnesota, that this shows that his associates recognized the fact that Sanford retained an interest in the Minnesota lands after the dissolution. This contention we do not dispute. But, if the plaintiff's counsel intend to draw the inference that that power of attorney was a recognition of the fact that Sanford had an interest in the lands, special and distinct from the other assets of the firm, the inference is a little remarkable, in view of the fact that counsel themselves state, on the same page and in the same breath, that Sanford joined in a similar power of attorney to Borup, for precisely the same purpose, in May, 1852, *being before the dissolution of the firm.*

The truth of the matter is, as appears from Prince's evidence, (appellant's statement, pp. 25, 28–29,) that he had powers of attorney to represent the firm both for the sale of lands, and also *for the settlement of all of its affairs*, and that he had specific, personal instructions from Sanford, who sent him to St. Paul to settle the affairs of the firm with Borup and Sibley, and that *with Sanford's knowledge* he sold real estate and "*made use of the proceeds of the sale sometimes in paying firm debts and in firm business.*"

III.

On pages 19 and 20 of their argument, the respondents' counsel seemingly attempt to convey the idea that the books of the firm show that, at the time of the dissolution, the new firm of "P. Chouteau, Jr., & Co., No. 3," took the assets and assumed the liabilities of firm No. 2. This is evidently an inadvertence on their part. For, immediately succeeding the evidence, they *quote* as having been given by the expert book-keeper, it distinctly appears (Rec., p. 490,) that the entry was made on May 1st, 1860, over eight years after the dissolution.

This entry is quoted and explained on page 36 of appellant's statement.

And referring to page 37, it will be seen that at the same date (May 1, 1860,) a balance sheet was made out by the book-keeper, who kept the books of all the firms until his death in 1865, and which distinctly shows that Sanford was interested indiscriminately in all of the business, lands and assets of firm No. 2.

The entry in the books of July 31st, 1862, referred to in respondents' brief, (p. 21,) we have already attempted to explain in our brief (pages 65, 66,) as lending no aid to the contention of the respondents, but as establishing the exact contrary thereof.

And by referring to the letter dated October 4, 1860, written at the dictation of P. Chouteau, Jr., (appellant's statement, pages 38, 39,) it appears that Mr. Chouteau then took the position that if Sandford's estate was unable to pay him *its proportion* of the amount that he had advanced, that the other partners would be liable "for their respective proportion of its (the estates) share of the indebtedness."

As the executors of Sanford's estate uniformly declined to do anything in the matter, it is likely that the entry of July 31, 1862, was made in accordance with the suggestion of the above letter and under some mutual arrangement made at the time between P. Chouteau, Jr., and the representatives of the estate of Sanford and Sire.

IV.

The counsel for respondents contend (p. 20) that because, as they say, Mr. Pierre Chouteau at the time of the settlement in 1859 brought forward no claim against Sanford's estate, by reason of advances made by him to pay off the debts of the St. Louis firm, this leads to the conclusion that no such claim, in fact, existed.

To this it may be fairly responded that inasmuch as the settlement of the two New York firms, in which Sanford and Chouteau had been partners, was the principal subject of negotiation and of anxiety to Chouteau; and, as according to the sworn statement of Barlow made at the time, (Rec., 387,) a fair settlement of the affairs of the firm would leave Sanford's estate indebted to Chouteau in the sum of $164,765.55; and as, *notwithstanding that fact*, the executors *coerced* from Mr. Chouteau the payment of the *additional sum* of $50,000, by threatening to apply for a receiver of all the firms in which Sanford and Chouteau had been interested, it does not seem, in view of these circumstances, that it

would have been of much avail for him to have asserted any additional claims against the estate.

And it is further to be observed that the release dated December 1, 1859, given by Chouteau to Sanford's executors, does reserve to him the right to collect all of the assets of the St. Louis firm "for his own use and benefit," and which, construed in the light of all the circumstances of this case, was evidently intended to allow him to collect and dispose of all those assets in the liquidation of the affairs of the firm without interference from Sanford's executors, and as had been agreed, (appellant's statement, p. 18,) at the time of the dissolution he should do. And he was to collect these assets for his own use and benefit, because of the fact that he had by the settlement precluded himself from asserting any individual claim against the estate, leaving him to look to the assets of the firm, which consisted at that time almost wholly of the Minnesota property, for the repayment of his advances. But Mr. Chouteau's subsequent acts and declarations show that he intended only to use those assets for his own use to the extent of repaying his advances, leaving the estate to participate in the residuary interest, if any remained.

If this clause of the release is not to be construed in the light of all the circumstances disclosed in the record, but is to be considered as it stands, then it must be treated as an absolute agreement made between Chouteau and the executors, wherein they released to him absolutely all of the interest of the estate of Sanford in the assets of firm No. 2, including the Minnesota lands, respecting which no exception was made. (See appellant's brief, p. 64.)

That the clause in question had no reference to any agreement existing at the time of the dissolution, such as is now claimed, is shown by the facts, that Barlow testifies that he does not remember to have seen it at that time; that Gebhart's letters betray that he had never seen it; and the declaration of Pierre Chouteau, Jr., in his letter, (appel-

lant's statement, p. 38,) is that no written agreement was made at the time of the dissolution.

V.

It is further asserted by the respondents' counsel, (pp. 23 to 33,) that the fact of the suit having been dismissed that was instituted by Pierre Chouteau *et al.* against Sanford's executors, in Minn., in 1861, is evidence that Chouteau regarded the answers filed by the executors as being truthful and incapable of refutation. But Mr. Chas. P. Chouteau testifies, (Rec., pp. 304, 305,) that the suit was dismissed at his instance because the executors indicated a disposition to make terms of settlement.

VI.

While it is conceded by respondents, (p. 34,) that a man as full of affairs as Mr. Barlow has been, could not be expected to accurately narrate the contents of the letters fifteen years after he had seen them, yet that the substance of the letters was crystallized in the answers filed in 1861 in the suit in Minnesota, thus preserving the memory of them.

But, referring to these answers, it will be seen, that the assertion is, that the whole matter was an assumption by Sarpy and Sire of Sanford's interest in the St. Louis firm; and by Sanford of the interest of Sarpy and Sire in the New York firm.

This, irrespective of the facts as proved, might be a rational conjecture, as the whole arrangement was for the accommodation of these three parties; Mr. Chouteau all the time retaining precisely the same interest in both firms, and having no individual concern in the change that was made.

But in his evidence in this case he testifies (Rec., 160,) that

"it was agreed that the *remaining partners* in the St. Louis house should be entitled to all the assets and property of the St. Louis firm, and that *they* would relieve Mr. Sanford from all liabilities and obligations," &c. The court below has found, (Rec., 26,) by its decree, that the whole matter of the transferring of assets and assumption of liabilities was between Sanford and Chouteau *individually*.

In view of the fact that Gebhart's letter to Barlow, written only twelve days before the original answer was verified by himself and Barlow, shows that he had no knowledge of the terms upon which the firm at St. Louis was dissolved, leaves little room for doubt that both the answers filed in that case were, so far as related to the agreement claimed to have existed at the time of the dissolution, purely a matter of conjecture or inference upon the part of Barlow and Gebhart, and this conclusion thus arrived at, has in some way, and by some confusion, after the lapse of fifteen years, naturally enough, perhaps, occurred to his mind as a memory of a fact.

And it is to be observed that if Mr. Barlow's evidence could be changed so that the word *outfit* or *business* or *interest* would be substituted for "property" or "purchase" or "lands," (which word was used he is not certain,) then it would stand in exact accord with the entire array of circumstances and of the acts and declarations of the original parties in interest, as presented by the record.

VII.

Charles P. Chouteau, the only person who had any intimate knowledge of the affairs of the firm, remaining alive at the time of the institution of the present suit, has given a consistent and detailed account of the arrangement between the partners at the time of the dissolution of the firm in 1852.

All of this evidence the respondents, (p. 40,) dispose of very summarily by saying that "his testimony is not of the slightest importance upon the main point," for the reason that he was acting as the purchasing agent of the firm, and that his business took him away to various places, &c.

We will venture the statement, without any fear of its being contradicted anywhere or by any person, that no man in the country stands higher for honesty and integrity of character than Mr. Chas. P. Chouteau. And that statement is also, we may add, eminently true of his father, Pierre Chouteau, Jr., who was one the best known and most honored of all the business men of the country in the last generation; and his ability and character were recognized by business alliances with men like Curtis Sampson, and Geo. Peabody, of London.

Mr. Chas. P. Chouteau testifies, (Rec. p. 298,) that he was acquainted with the negotiations that were pending looking to the withdrawal of Sanford from the St. Louis firm, which took place (290) when all the partners were present; that (271) he was present with them when the final arrangement was made, and that (310, 311) he was on the most intimate and familiar terms with all the partners, not only in business matters, but socially; that Sanford, when he visited St. Louis, stopped at the house of his father, of his sister, or at his house; that the relation that Sanford bore to the firm was a subject of frequent consideration between Sanford and himself, and that he was entirely familiar by conversation had with the several partners respecting the terms of the dissolution.

It would seem that such evidence is entitled to some consideration and respect; especially so, when it is found to be in exact accord with every act and declaration of the partners during their lives. And of all these numerous acts and declarations, disclosed by the record of this case, the respondents' counsel are, so far as can be discovered from their statement and brief, utterly oblivious.

VIII.

The respondents' counsel have very briefly, and apparently with much satisfaction to themselves, disposed of all the detailed and undisputed evidence respecting the manner in which the Minnesota lands were acquired in the settlements made in 1855 with Borup and Sibley, by the simple suggestion that, (p. 43,) in the suit instituted by Pierre Chouteau, Jr., *et ali.* in Minnesota in 1861, it was alleged that the lands, a portion of which are now in controversy, belonged to the firm at the time of the dissolution.

This declaration we had in our "great carelessness in reading the evidence" assumed as a matter of pleading to be technically and legally correct, for the reason that the real estate was acquired in the liquidation of the business of the firm, and that every thing acquired by settlement, compromise, purchase, or otherwise, during the making of such liquidation did, in fact, by legal relation, belong to the firm at the very time of the dissolution.

The illumination given to this subject by the able counsel has not quite convinced us that this assumption was erroneous: and in any event, it is not made altogether apparent, how the declarations of an attorney in a pleading can be made absolutely conclusive, against a party in another suit, to disprove facts otherwise unimpeached. And if the respondents desire to accept *all* of the averments, in the complaint referred to, as being true, we see no objection to be made on the part of the appellants.

MELVILLE C. DAY,
ROSCOE CONKLING,
Counsel for Appellants.

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Appellants,

agst.

S. L. M. BARLOW AND OTHERS,
Respondents.

BRIEF FOR RESPONDENTS.

W. D. SHIPMAN,
W. P. CLOUGH,
Counsel for Respondents.

Evening Post Job Printing Office, New York.

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BRIEF FOR RESPONDENTS.

Statement of the Case.

This is an appeal from a final decree of the Circuit Court of the United States, for the District of Minnesota. The decree appealed from is printed in the record, on pages 149-159. Although the record sent here is voluminous, the real facts in the case are comparatively brief. They are as follows:

For some time prior to the year 1852, there existed in the City of St. Louis a firm known as "P. Choteau, Jr., & Co., No. 2." This firm was composed of P. Choteau, Jr.,

John B. Sarpy, John F. A. Sanford and Joseph A. Sire. The respective interests of those parties in the copartnership business had, prior to the year 1852, become as follows: P. Choteau, Jr., 48 per cent., and the other three copartners, Sarpy, Sanford and Sire, 17⅓ per cent each. The business of the firm consisted mainly in the purchase and sale of furs, which involved the maintaining of trading posts, stocked with all sorts of merchandise, at several points in the northwest. The firm did a very extended business, employed a large capital, and possessed large assets. In the year 1852, the copartnership dissolved, for the purpose of enabling John F. A. Sanford to remove from St. Louis to the City of New York, and there form a new firm, in which himself, and Mr. P. Choteau, Jr., his father-in-law, were to be the principal partners, and which was to engage in a different class of business. While the St. Louis firm, P. Choteau, Jr., & Co., No. 2, was carrying on business, it maintained a trading post on the east side of the Mississippi river, at the City of St. Paul, and other trading posts on the west side of that river, in the same vicinity. The interests of the company in St. Paul and vicinity were represented by various parties, among others, General H. H. Sibley, and Dr. Charles W. Borup, the latter long since deceased.

Among other assets acquired by the St. Louis firm in the course of its business, was a large quantity of real estate at St. Paul and elsewhere in the State of Minnesota, which, although of comparatively small value in 1852, has since grown to be of great value. The real estate mentioned is the subject of the controversy litigated in this suit.

All of the partners in the St. Louis firm have been dead many years. John F. A. Sanford died in the City of New York in the year 1857. P. Choteau, Junior, was the last survivor, and he died in 1865. Sanford, at his death, left a will disposing of his estate, and appointing S. L. M. Barlow and Frederick C. Gebhard, of the City of New York, the executors and trustees thereof. Gebhard died before the filing of the present bill, leaving Barlow the sole surviving executor and trustee. Sanford left surviving him his widow, Isabel Sanford, and two children, John F. A. Sanford and Emile Sanford, since intermarried with Count Sala, of Paris, France. Mr. Barlow, the executor and trustee, and the widow

and children of Sanford, are the complainants in the present litigation. Choteau died, leaving two children, Charles P. Choteau, and Julia, intermarried witn Dr. Maffitt. Sire and Sarpy also left heirs. The heirs and legal representatives of Choteau, Sarpy and Sire are defendants in the litigation.

The chief points in controversy are as follows: It is insisted, on the part of Sanford's heirs and representatives, that at the time of the dissolution of the St. Louis firm, a special agreement was entered into whereby Sanford relinquished his interest in all the assets of the firm except the lands in Minnesota; that in consideration of such relinquishment he was to be protected against any further liability for the indebtedness of the concern; and that, consequently, his interest in the Minnesota real estate was to be absolute, that is to say, $17\frac{1}{3}$ per centum thereof, freed from any indebtedness or liability whatever. This proposition, maintained by the Sanfords, is disputed by the Choteaus, Sarpys, and Sires. These have not been consistent in their contentions. At one time they have maintained that a special agreement was entered into between Sanford and the other members of the concern at the time of its dissolution, whereby Sanford relinquished his interest in all the assets, the Minnesota property as well as the rest. This view formed the theory upon which this case was defended in the court below, as will appear by the following extract from their answer:

"On the contrary thereof, these defendants say that on the 31st day of December, A.D. 1852, said copartnership, in said bill of complaint named, was duly dissolved, and said John F. A. Sanford withdrew therefrom, and then and there, for a valuable consideration, to him paid by said Pierre Choteau, Junior, did sell, assign, transfer, and set over unto the said Pierre Choteau, Junior, all and singular his share and interest in and to the assets of said partnership, of all and every kind and description whatsoever, including his interest, if any he had, as a member of said firm, in and to the lots and lands in said bill of complaint described, and all and every part and parcel thereof, and from thenceforth said Sanford never had, or claimed to have, any interest in, or right to, a share in the proceeds of said lands or lots."

(Printed Record, page 21, folio 39.)

At other times the parties mentioned have claimed that, at

the dissolution of the firm, there was no special agreement, but that the dissolution was merely in general terms, leaving the respective rights and interests of the parties in the firm assets to be determined by the law. This is understood to be the theory of the brief for the appellants in this court. The appellants are now understood to maintain, by their present counsel, that instead of any agreement having been entered into when Mr. Sanford retired from the St. Louis house to form the New York house, he simply retained his interest in the assets of the dissolved firm, subject to his proportionate share of the liabilities thereof. This indebtedness turned out, upon full settlement of the affairs of the firm, to amount to about the sum of $200,000 in exess of what was realized from the firm's assets other than the lands in the State of Minnesota; the exact figures of the deficiency amounting, on May 1st, 1860, with interest calculated up to that date, to $212,724.23.

(See printed record, page 264, folio 518.)

This deficiency was paid by P. Choteau, Jr., Sire, and Sarpy, or by Choteau alone, as is claimed; Sanford never in his lifetime, so far as the evidence shows, having been called upon to contribute in any manner toward making it good.

The present position of the appellants, therefore, amounts to this, as counsel for the respondents understand it: Sanford was entitled, upon and after the dissolution of the firm, to $17\frac{1}{2}$ one-hundredth parts of the Minnesota real estate, subject to a similar proportion of the deficiency of $212,724.23 before mentioned.

It is also claimed, but it is believed not very seriously, that the particular real estate described in the bill of complaint and in the decree, or at least a part of the same, did not belong to the firm of P. Choteau, Jr., and Company No. 2.

Some other points are raised in the appellants' brief; but it is believed by counsel for respondents that the only serious contention by appellants' counsel, will be upon the question whether or not a special agreement was entered into at the time of the dissolution of the St. Louis firm, such as the respondents claim to have been entered into upon that occasion.

Points and Authorities.

I.

The respondents maintain the evidence to clearly show that when the firm of P. Choteau, Junior, & Co., No. 2, of St. Louis, dissolved in the year 1852, *it was upon the terms stated in the bill of complaint.*

It can be safely asserted that no evidence whatever has been produced by any person having any knowledge of the facts to the contrary of this proposition. On the other hand, in support of the proposition, the respondents produced upon the hearing the following conclusive array of proofs:

FIRST.—Mr. S. L. M. Barlow testified positively upon the point. As his evidence is by far the most important of any in the case, it is herein quoted at length:

"SAMUEL L. M. BARLOW, sworn as a witness on the part of the plaintiffs, and examined pursuant to the annexed notice dated November 17, 1876, testified as follows:

Q. Mr. Barlow, did you know John F. A. Sanford?

A. I knew John F. A. Sanford in his lifetime; he died at the City of New York in the year 1854; he left a last will and testament, by which he appointed Fred. C. Gebhard and myself sole executors; Mr. Gebhard has since died and I am his only executor; he left as heirs-at-law and next of kin his widow, Isabella Sanford, and his three children, to wit, Benjamin C. Sanford, John F. A. Sanford and Emile C Sanford, who has since married and is now the wife of Count Sala, and resides at Paris; his widow and all his children, except Benjamin, reside at Paris, in France; that will has been admitted to probate in the City of New York, and also in Minnesota.

Q. Mr. Gebhard died when?

A. In 1867, I think; I won't be positive; he died before the commencement of this action.

Q. Did you know Mr. John B. Sarpy?

A. Yes.

Q. When did he die?

A. John B. Sarpy died about the year 1857; I also knew Joseph A. Sire, who died, I think, in the year 1854; and I was well acquainted in his lifetime with Pierre Chouteau, Jr., who died about the year 1865.

Q. Did you know the firm of P. Chouteau, Jr., & Co., of St.

Louis, and the firm of Pierre Chouteau, Jr. & Co., of New York, and also the firm of Pierre Chouteau, Jr., Sanford & Co., of New York and London?

A. Yes, I knew all those firms; and, for the purpose of being more clear in the giving of my testimony, I will designate the first firm as the St. Louis firm, the second as the New York firm, and the third as the New York and London firm; the first firm was composed of Pierre Chouteau, Jr., Joseph A. Sire, John B. Sarpy and John F. A. Sanford; it commenced business as a firm, I think, previous to 1814; the interest of Mr. Sanford in that firm was originally 16 per cent., but it was afterwards, and, I think, in the year 1849, increased to $17\frac{1}{3}$ per cent.; the New York firm was composed of Pierre Chouteau, Jr., and John F. A. Sanford only; I am not able to state positively when it commenced business in New York, but I think in the year 1852; and about the same time the New York and London firm was organized and commenced business, and was composed of Pierre Chouteau, Jr., John F. A. Sanford, Uriah A. Murdock, Geo. Peabody and Curtis Lampson; Mr. John F. A. Sanford retired from the St. Louis firm at the time of the organization of the firm of Pierre Chouteau, Jr., & Co., of New York; his retirement formed the subject of an agreement in writing between himself and the St. Louis firm.

Counsel for plaintiff asked counsel for defendants to produce that agreement pursuant to notice hereto annexed (notice marked Exhibit H).

(Counsel for defendants objects that such notice has not been served upon the attorneys for the defendants whom he represents, and was only served upon himself yesterday, since which there has not been time to communicate with the attorneys for the defendants at St. Paul, Minnesota, and objects to any secondary evidence being given of said agreement, in consequence of non-production of said agreement under said notice.)

The witness continues: I have seen that agreement and it was at one time in the possession of Mr. Gebhard and myself; I saw the agreement in the years 1858 and 1859, at the time of the negotiations for a compromise between Mr. Jno. F. A. Sanford's representatives and Mr. Pierre Chouteau, Jr., of the claims of the latter against the estate of Sanford for his share of the losses of the New York house; the next and last time I remember to have seen this contract was in the year 1861, at the time when I assisted in preparing an answer to the bill filed in Minnesota, by Mr. Chouteau, for the sale of the lands in question in this suit: I remember the contents of that contract; it was in the shape of a letter signed in the firm name of Pierre Chouteau, Jr. & Co., addressed to Mr. Jno. F.

A. Sanford, and responded to by him as of the same date, assenting to the terms proposed in the letter. These terms were that, from that date Mr. John F. A. Sanford should retire from all connection with the St. Louis house, with the view of establishing a house in New York in connection with Mr. Chouteau, in which neither Sarpy nor Sire would have any interest; and it was agreed that the remaining partners in the St. Louis house should be entitled to all the assets and property of that firm, should have sole power to settle its business, that they would relieve Mr. Sanford from all liabilities and obligations connected with the St. Louis firm, and that his interest in the Minnesota lands owned by the said St. Louis firm should be retained by him absolutely; I was cognizant of the existence of this contract for many years previous to Mr. Sandford's death, but it came into my possession at the time of my negotiations with Mr. Chouteau in 1858 and 1859, and was in the possession of the counsel of the executors, Mr. Gebhard and myself, at the time of the drawing of our answer to the bill of Mr. Chouteau, in Minnesota, to which I have above referred, which bill was filed by Pierre Chouteau, Junior, and Pierre A. Berthold and Chouvin V. Le Beau, executors, &c., of the last will and testament of Jno. B. Sarpy, deceased, and Jos'h H. Conn, surviving executor, &c., of the last will and testament of Joseph A. Sire, deceased, against Mr. Gebhard and myself, executors of the last will and testament of Jno. F. A. Sanford, deceased. The suit was brought in the District Court for the Second Judicial District in the County of Ramsey, in the State of Minnesota; in this action Mr. Gebhard and myself filed an answer, and afterwards an amended answer, and the plaintiffs filed a reply; I now read these four papers as a part of my testimony, and they are marked by the notary as Exhibits A, B, C and D, December 7, 1876; after the filing of the reply to an amended answer by the plaintiffs, this suit was discontinued, I think at the end of the year 1861, and from that time has never been prosecuted. The agreement to which I refer is lost; I have made every possible examination of all my own papers, of the papers of my firm, of the papers of Mr. Gebhard and those of the firm of Platt, Gerard & Buckley, who were the counsel of Mr. Gebhard and myself in the suit last above referred to, and no trace of that agreement or any copy of it can be found. I believe that the same must have been sent to Minnesota at the time of the existence of the suit in question and was lost, or at any rate was not returned from there. The averment in the answers, both original and amended, to this bill of Chouteau, were drawn as to the original answer by Mr. Jeremiah Larocque, now deceased, with the agreement in question before him, and by Mr. Gerard, also since deceased, as to the amended answer, upon my statement to him of the facts; and

the averments in both the original and amended answer, in respect to the lands in question in this action, to the best of my knowledge and belief were accurate and true, and were based upon the agreement in question without alteration and addition. At the time of the negotiation for the compromise of the debt due by Mr. Sanford, as a member of the New York firm, Mr. Pierre Chouteau, Junior, was client of ours, and had been for a long time previous thereto, and the first negotiation for this compromise was commenced in the year 1858. I had many interviews at that time with Mr. Pierre Chouteau, Junior, and obtained through him the facts based upon which a petition was drawn, subscribed, and sworn to by him, to the Surrogate of the County of New York, for permission or authority to the executors of Mr. Sanford to make the compromise in question.

(Counsel for defendants, represented by R. B. Galusha, attorney, objects in due time to any testimony by the witness, one of the plaintiffs in this action, to any conversation or transaction had between witness and Mr. Pierre Chouteau, Junior, deceased, ancestor and testator of the defendants.)

Witness continues: The paper which I now read is a complete copy of the petition to which I refer, drafted by my late partner, Mr. Jeremiah Larocque, and although I have searched for the original I do not find it, and assume that, as it was never used before the Surrogate, it may have been destroyed by Mr. Chouteau.

(Defendants' counsel objects to the introduction of this paper as secondary evidence of the paper said to have been in writing, for which secondary evidence no foundation is laid.)

Witness continues: The paper is marked E, Dec. 7, 1876; after the preparation of the petition in question and its verification by Mr. Chouteau, it was thought wiser that the petition to the Surrogate for leave to make the compromise in question should be made by the executors themselves, and that course was afterwards adopted; upon their application an order of the Surrogate of the County of New York allowing a compromise with Mr. Chouteau was entered, of which a certified copy is now produced and read, and the same is marked Exhibit F, December 7, 1876.

At the time of the negotiation for this compromise, Mr. Chouteau still being a client of Mr. Larocque and myself, it was thought wiser that the executors, Mr. Gebhard and myself, should be represented by Mr. Gerard, who was retained by us for that purpose, and so many difficulties arose in the course of this negotiation, which lasted, if I remember, more

than a year, and so many questions between the executors and Mr. Chouteau had to be disposed of, that upon the advice of Mr. Larocque and myself Mr. Chouteau called in Mr. Daniel Lord, Junior, an associate counsel, and from that time all matters connected with the compromise in question, in so far as Mr. Chouteau was concerned, received the supervision of Mr. Lord and Mr. Jeremiah Larocque.

In the course of this negotiation it was stated by Mr. Chouteau, whose knowledge of the assets and property of Mr. Sanford, deceased, was probably greater than that of anybody else living at that time——

(Counsel for defendants, represented by R. B. Galusha, objects to any testimony, now or hereafter, in the course of this deposition, by this witness, to any conversations or transactions which took place or were had between this witness and Pierre Chouteau, deceased, upon the same ground above stated.)

Witness continued: I think Mr. Chouteau had better knowledge of the assets of Mr. Sanford's estate probably than any man now living, and his estimate of it was that, after compromising Sanford's share of the debt of the New York house, all the other debts of the estate would be less than $15,000, and that the assets in the hands of the executors would considerably exceed that amount then available, in addition to Sanford's interest in the Minnesota lands, which were then said by Mr. Chouteau to be unsalable, but which would probably at a future time be of the value of $100,000, and upon that basis Mr. Sanford's interest would be some $17,000. This left so small a sum for Mrs. Sanford and her two infant children that the executors refused to carry out the proposed compromise, and afterwards Mr. Chouteau agreed to and did add to his offer the payment of $50,000 in cash, and the estate to agree to obtain, and did afterwards obtain, the release and quit-claim of Benjamin C. Sanford and wife to all interest in the assets and estate of John F. A. Sanford, deceased, which release I now read, and it is marked Exhibit "G," 7 Dec., 1876. At the time of the consummation of this compromise there were certain pieces of real estate in which Mr. Sanford had an interest in New York, Pennsylvania and Michigan, as well as the lands in Minnesota. Special releases from the executors and Mrs. Sanford of all these properties outside the State of New York were agreed to be given and were afterwards executed and delivered, except as to the lands in Minnesota, for which no release was asked or executed. The releases in question are now read and are marked Exhibits I, J, K, 7 Dec., 1876. At the time of the execution of the release by Mr. Chouteau to the executors, forming a part of the compromise in question, the original of which is now produced and marked Exhibit L,

Dec. 7, 1876, and I read, the following words were inserted in the release at the request of the counsel of Mr. Chouteau, namely: "Nothing herein contained is to affect the rights which the said Pierre Chouteau, Junior, now has, either as surviving partner or by assignment to collect all the assets of any firm formerly existing at St. Louis, in the State of Missouri, in which the said John F. A. Sanford was formerly a partner, for his own sole use and benefit, according to the terms agreed upon on the retirement of the said John F. A. Sanford from said firms, or to affect or impair the right of the said Pierre Chouteau to said assets."

This was deemed necessary, and was assented to, because among the claims previously set up by the executors of Mr. Sanford, was one that they had a right to a receivership of the assets of all the firms in which Mr. Sanford had been interested.

(Counsel for defendants objects to the foregoing testimony explaining the written instrument in evidence as inadmissible, as parol evidence to contradict, vary, or explain an instrument in writing and under seal.)

Witness continues: And it was deemed by the executors of Mr. Sanford, at the time of the compromise, that by the original contract before testified to, entered into at the time of the retirement of Mr. Sanford from the St. Louis house, about the year 1862, that Mr. Chouteau had the sole right to administer the assets of that firm without interference by Mr. Sanford in any form, but this does not refer to Mr. Sanford's interest in the Minnesota lands in any way, directly or indirectly.

(Counsel for defendants desires the last above objection to apply also to what the witness has just testified to since the making of that objection, and to all parol testimony by this witness as to the purport or intent of the instrument in writing.)

Witness continues: In accordance with the order of the Surrogate, the executors of Mr. Sanford executed a release to Mr. Chouteau, but I have no copy with me, and at the same time they also executed an agreement intended to form a part of the compromise and settlement in question, which agreement is now read and marked Exhibit "M," Dec. 7, 1876, and the compromise as authorized by the Surrogate by his order was fully consummated. The estate of John F. A. Sanford, of which I am executor, is not yet closed, and I am still acting as executor and trustee, there having been no final accounting had of my trust. I have never been advised of any sales of any portion of the Minnesota lands except as the same are set forth in the answer in this action, and have no personal knowledge that any sales have taken place; have never received any portion of the proceeds.

Adjourned to December 22, 1876.

FRIDAY, December 22, 1876.

SAMUEL L. M. BARLOW, witness, again appeared pursuant to adjournment; parties represented by same counsel.

CROSS-EXAMINATION by Tompkins Westervelt, counsel for defendants:

Q. You have testified to an agreement between John F. A. Sanford and the St. Louis firm of P. Chouteau, Junior, & Co., in the form of letters by each to the other; when and where did you first see that agreement or those letters?

A. I don't think I ever saw the letters until after Sanford's death, when they were found among the papers of the deceased, and were in the possession of Mr. Gebhard and myself.

Q. How many times in all did you ever see and examine those letters?

A. I cannot say how many times, but a great many; the first time when I had occasion to examine them carefully was at the time when Mr. Jeremiah Larocque drafted the original answer of the executors to the bill filed by Mr. Chouteau for partition, which I have referred to in my direct-examination. That was the first time I had occasion to examine them carefully.

Q. When and where, and in whose possession did you last see those letters?

A. My recollection is that the last time I saw them they were in the possession of Mr. Platt, at the time of the drawing of the amended answer to the same bill, when at our request, he went to Minnesota for the purpose of filing the amended answer in the same action.

Q. Did you on that occasion leave these letters in the possession of Mr. Platt?

A. Either Mr. Platt or Mr. Gebhard; I am not positive.

Q. In whose possession were the papers of the estate kept?

A. Exclusively in the possession of my co-executor, Mr. Gebhard, until his decease, when they were returned to me by his executor, Mr. Wm. Gebbard.

Q. Have you ever seen these letters since the decease of Mr. Gebhard?

A. No.

Q. Have you any recollection of ever having seen them since the time when you stated you saw them in the possession of Mr. Platt or Mr. Gebhard?

A. No; I am quite certain I have not; I am not absolutely certain that I have seen these letters since they were in the possession of Mr. Jeremiah Larocque, who drafted the original answer to the bill in Minnesota, although I think they were in the possession of Mr. Platt when he went to the West with the amended answer.

Q. Did you know what was done with those letters after you last saw them?

A. I do not.

Q. At the time when you saw them in the possession of Mr. Platt, Mr. Platt was about going West with the papers connected with the litigation?

A. He drafted the answer here, and went to the West; I am confident that we had them at that time, and that he had them, though my recollection of them has reference more distinctly to the time when Mr. Larocque drew the first answer, some months previously.

Q. How many times in all do you recollect to have read those letters yourself?

A. I cannot answer with any definiteness; I don't know that I ever read them very carefully, except at the time when this answer was being drawn.

Q. Do you know in whose handwriting those letter were, or either of them?

A. No.

Q. Do you know the signature of either or both?

A. Of both; the first was signed by Mr. Chouteau, in the name of his firm, and the second was signed by Mr. Sanford, being a brief response admitting the receipt of the letter, and acknowledging that that was the understanding; the signature was simply the firm name of P Chouteau, Junior & Co., in the handwriting of P. Chouteau, Junior.

Q. Can you state the date of the letter signed P. Chouteau, Jr., & Co.?

A. No; except inferentially.

Q. Can you state the place from which it was addressed?

A. St. Louis.

Q. Can you state the date of the letter signed John F. A. Sanford?

A. No, sir; the dates were nearly the same.

Q. Both of these letters which you read were originals and not copies?

A. Yes; the whole of them; I don't know but what Mr. Sanford's was a copy of the original sent, but it was signed by Sanford; the letter from Mr. Chouteau I am quite confident was not in the hand of Mr. Chouteau, but in the hand of some other person.

Q. Will you please state, as accurately as you can, the form and language of these letters?

A. The first was dated at St. Louis, and addressed to Mr. John F. A. Sanford, and recited the fact that it had been agreed that from that date his interest in the firm of P. Chouteau, Junior, & Co., of St. Louis, should terminate, and that the assets and business of the firm should be continued for the benefit of the remaining partners, who agreed

to assume all the responsibilities of the firm from that date, with a reservation at the close of the letter that Mr. Sanford's interest in the Minnesota property or purchase, according to my recollection—I won't be certain whether it was property or lands—should remain in him; in one of the letters (I think the St. Louis) there was a reference to the fact that Mr. Sanford was about to or had established a firm in New York, in which Mr. Sanford and Mr. Chouteau alone were interested, to the exclusion of Sarpy and Sire; the fact appeared in the letter that a New York house was about to be established, or was established, in which Sarpy and Sire would have no interest; Sandford's response was exceedingly brief, and contained merely an assent to the terms proposed or suggestion in the first letter; that is as near as I can recollect the contents of the letter.

Q. Can you state whether the reference to the Minnesota property in that letter spoke of interest in the Minnesota lands or in the Minnesota "outfit?"

A. I am confident that it was not "outfit;" it was either lands or property—Minnesota lands or Minnesota property—and not outfit, I am confident.

Q. Are you confident that the language used was Minnesota lands and property, and not Upper Mississippi?

A. Entirely so.

Q. Do you know whether or not, prior to 1852, there was any firm in New York of which Mr. Sanford and Mr Chouteau were partners, either alone, or in connection with other persons?

A. No, I do not; if I have known of it, I have forgotten.

Q. Among the books and papers of Mr. Sanford delivered to you by the executors of your co-executor, Mr. Gebhard, were the letter-books and correspondence of Mr. Sanford included?

A. No.

Q. Have you never had in your possession or seen the letter-books of Mr. Sanford?

A. I don't remember that any such books were ever delivered to me—not even his books of account, if he ever had any.

Q. Will you state when and where the interviews and conversations which, in your direct testimony, you have stated you had with Mr. Pierre Chouteau, Junior, in relation to the compromise of the Sanford estate, took place?

A. Originally at the office of Mr. Larocque and myself.

Q. When?

A. I should think in 1858 the original conversations took place; they were continued from time to time here, and I think at Mr. Chouteau's hotel, which I think was the New York Hotel in this city, for a considerable period at various times

for nearly or quite a year before the final consummation of the arrangement down to the time of the actual consummation.

Q. These conversations all took place here in New York?

A. All took place here in New York.

Q. At the time of such conversations were you and your law firm the advisers of Mr. Pierre Chouteau, Junior, in New York?

A. In part; we had partial charge of his business, &c.

Q. Did these conversations which you have spoken of relate to Mr. Chouteau's rights and liabilities with the different partnerships of which he was a member?

A. To some degree; they more or less referred to those interests.

(Counsel for the defendants moves now to strike out all the testimony of the witness as to conversations between himself and Mr. P. Chouteau, Junior, on the ground that they were conversations between counsel and client.)

Q. Did these various conversations with Mr. Pierre Chouteau, Junior, to which you have testified, include negotiations for the compromise which was afterwards effected?

A. They were substantially all made pending the negotiations of the compromise that was finally consummated between Mr. Chouteau and the executors.

Q. Were the negotiations with Mr. Choteau conducted by himself on his own behalf?

A. No; they were conducted originally by Mr. Chouteau, with Mr. Jeremiah Larocque acting as his counsel, and afterwards with Mr. Lord, with Mr. Larocque, and almost wholly with Mr. Gebhard or Mr. Gerard, or his associates, representing the executors, I taking very little part in the negotiation on either side; Mr. Jeremiah Larocque was my law partner.

Q. Did Mr. Chouteau in person take part in the negotiations which resulted in this compromise?

A. Originally no one else other than Mr. Pierre Chouteau, Junior, had anything to do with the negotiation; the original negotiation was commenced by Mr. Chouteau in person; I think before the matter was consummated, that he had practically retired from the negotiation, owing to his inability to agree with Mr. Gebhard; I do not know but what they had ceased to speak; it was wholly conducted by counsel; my relation was never changed with Mr. Chouteau personally; he continued throughout the whole progress of the negotiation up to the time of the final completion of the negotiation; I don't mean to say that he was in New York all the time, but occasionally and through the progress of the whole negotiation.

Adjourned to Friday, December 29, 1876, 11 o'clock.

Further adjourned to Friday, January 5, 1877, at 2 P. M.

FRIDAY, January 5, 1877.

Samuel L. M. Barlow, witness, again appeared pursuant to adjournment; parties represented by same counsel.

CROSS-EXAMINATION by Tompkins Westervelt, counsel for defendants, continued:

Q. Mr. Barlow, the negotiations which you have testified to between yourself and Mr. Gebhard, as executors of Sanford, and Mr. Chouteau, for a compromise, resulted in a settlement that was expressed in the different written agreements and papers that we have put in evidence?

A. Yes; I think there were some other papers executed than those which I have been able to produce; they have no special bearing upon the question, I think, being wholly releases of Mrs. Sanford of particular pieces of property outside of the Minnesota land; those I have not put in evidence.

Q. But the agrements were all reduced to writing?

A. All reduced to writing.

Q. You commenced an action in the Supreme Court in this State in reference to these Minnesota lands, and Mr. Sanford's interest therein, did you not, against Mr. Chouteau or his executors?

A. Against the executors of Chouteau.

Q. Did you prepare the complaint in that action?

A. No, though I must have been cognizant of it.

Q. It was prepared under your direction?

A. It was prepared under my orders.

Q. You read it after it was prepared and before it was served?

A. I think I swore to it; that is my recollection.

Q. Is there any doubt that you read it before it was served, and were aware of its contents?

A. I think not; there is no doubt that I knew of it at the time.

Q. Did you have any correspondence with Mr. Chouteau on the subject of the compromise which was effected in 1859, prior thereto?

A. I do not remember; most of our intercourse was in Mr. Chouteau's presence here and in my own office, but the negotiation lasted, if I remember, more than a year, and it may well be that I wrote him, but I cannot be certain.

Q. By correspondence I mean from him—letters from him?

A. I don't remember.

Q. If you had any such have you preserved them?

A. Yes, if they were directed to me; if they were directed to the executors I have not; anything to me, I have no doubt I have got the originals of.

Q. Can you by examining the papers in your possession ascertain whether you have any such letters?

A. Without any difficulty.

Q. Can you now state whether you have in your possession the letter books of Mr. Sanford?

A. I have not; they were never in my possession to my knowledge.

Q. After the death of your colleague, Mr. Gebhard, did you receive from his representatives all the papers of Mr. Sanford which they had?

A. I received what was supposed to be all that I had any interest in, but nothing connected with any of the firms which Mr. Sanford was interested in; the letter books of Sanford were not delivered to me by the representatives of Mr. Gebhard, and have never been in my possession.

RE-EXAMINED for the plaintiffs by Mr. Anderson:

Q. Have you made any application to the executor of Mr. Gebhard for the papers connected with the Sanford estate?

A. I have quite recently, both by letter and in person, and explained to Mr. Gebhard's executor the importance of obtaining everything connected with the estate, in the hope that I might find the agreement to which I have testified; I also employed the clerks of Mr. Gebhard to make a careful examination of the old papers in their office, with the same view, but did not succeed in obtaining anything from either source having any bearing upon this question.

Q. In reference to the compromise to which you have testified between Mr. Chouteau and the Sanford estate, were you the attorney or counsel to Mr. Chouteau in that matter at all at that time?

A. No; neither counsel or attorney.

Q. Were you at any time in connection with that compromise?

A. No; Mr. Jeremiah Larocque was his counsel; I was one of the parties as an executor of Sanford; my counsel and the counsel of my associate was Mr. James W. Gerard, Sr.

Q. Your interests as executor of Mr. Sanford and the interests of Mr. Chouteau were hostile, were they?

A. They were adverse.

Q. And did Mr. Chouteau have any special counsel?

A. He afterwards, at the suggestion of Mr. Larocque and myself, because of the fact that Mr. Larocque was my partner and I was an executor, employed Mr. Daniel Lord, Sr., who had no connection with us in any form.

Q. In reference to the agreement which you have spoken of as having been made by the firm of P. Chouteau, Jr., & Co., of St. Louis, and Mr. Sanford, at the time of Mr. Sanford's retirement in 1852, had you been informed of the existence of any

such agreement before the matter of the compromise was entered upon ?

(Objected to by counsel for defendants as immaterial and incompetent.)

A. I knew that Mr. Sanford claimed an interest in the Minnesota lands in his lifetime.

(Defendants' counsel objects to this answer on ths same grounds and as irresponsive.)

Answer continued : I do not know that I knew of any agreement about it at that time, or had ever heard about it ; the simple fact was referred to ; the part of Mr. Sanford's interest in the Minnesota land was referred to by Mr. Chouteau in the course of the negotation which led to the compromise after Mr. Sanford's death.

(Counsel for defendants objects to this part of the answer upon the same ground as stated before and as a conversation with a deceased party.)

Answer continued : I think I saw the agreement in question at the time of the preparation of the papers executed on this compromise, but I cannot positively say that I did; my first distinct recollection of seeing the agreement in question was at or about the time of the drafting of the answer of the executors to the bill filed by Mr. Chouteau for the partition of the lands in Minnesota, to which I have testified.

Q. What is the present condition of the suit about which you have testified in your cross-examination, as brought in the City of New York against Mr. Chouteau and others, executors ?

(Objected to by defendants' counsel as immaterial and irrelevant.)

A. That suit was brought by myself after the death of Mr. Gebhard, under the advice of Mr. MacFarland, and was prosecuted for a number of years without my personal attention having been given to it at any time seriously, I think for half an hour, and at the end of that time, when I first was compelled to examine the question carefully, I came to the conclusion that the suit had been improperly brought here ; that my counsel had, in a degree, at least mistaken the proper form of the action, and after consultation with him it was determined to abandon the suit, which was thereupon discontinued and costs paid, and then the suit now pending in Minnesota was commenced by my direction.

SAMUEL L. M. BARLOW."

See printed record, pp. 159–171.

Unless Mr. Barlow is utterly mistaken in his evidence, there can be no doubt that the arrangement upon the dissolution of the St. Louis firm was as the appellants contend it to have been, and the real question upon this point is reduced to this: Is Mr. Barlow correct in his statement, or is his narrative a mere fiction, the result of some strange and unaccountable hallucination?

SECOND.—The principal circumstances surrounding the transactions are inconsistent with any other theory than that the dissolution was upon the very terms to which Mr. Barlow testifies. The concern, P. Choteau & Co., No. 2, was a very large affair. During its existence and period of activity it was one of the few great concerns of the country. Its capital was half a million dollars (see printed record, page 268, folio 525). It would be a mistake to suppose that the Minnesota lands formed any considerable portion of the firm's effects when the dissolution occurred. On the contrary, those lands formed but a trifling fraction of the total value of the firm's assets. For instance, it appears from Exhibit No. 7, annexed to the deposition of C. P. Choteau, that the concern had real estate in St. Louis and neighborhood alone to the aggregate value of about $80,000, which in the winding up was taken by the other members of the concern. (See printed record, page 338.) On the other hand, the valuation put upon property comprising nearly the whole of the real estate here in litigation in the year 1851, the year prior to the dissolution, was only $3,500. That is the consideration named in the deed to Dr. Borup, the representative, as above stated, of Pierre Chouteau, Jr., & Co., in St. Paul, when the property was originally acquired. (See printed record, page 441, folio 914.) It is not likely that in the year 1852, when the partnership was dissolved, the value of this property had advanced much beyond what it had been in the previous year. Hence there would be nothing connected with the value of the interest that would be secured to Sanford, which would make the arrangement contended for here improbable. His $17\frac{1}{2}$ one-hundredths part of this property could not, at that period, have amounted to more than a few thousand dollars, a mere trifle compared with the total assets of such a concern as the St. Louis firm.

The fact of the retention by Sandford of an interest in the

Minnesota lands, after the dissolution, was repeatedly recognized by the acts of his associates.

For instance, in the month of May, 1852, Chouteau, Sire, Sarpy and Sandford joined in a power of attorney to Dr. Borup, authorizing him to sell and convey the lands.

See printed record, p. 240.

Afterward, and in the year 1856, Sire having previously died, Chouteau, Sarpy and Sandford joined in another power of attorney to John S. Prince, authorizing him to convey the *same lands*, and especially the lands in Kittson's Addition to St. Paul, and revoking the power of attorney to Dr. Borup, above mentioned.

See printed record, pp. 242–243.

In the following year, 1857, and but a short time prior to Sandford's death, a deed was obtained from Louis Robert, of one of the most valuable of the tracts of land here in controversy. In that deed Sandford was expressly named as a co-grantee with Chouteau and Sarpy.

See printed record, pp. 213–214.

This deed was executed for the purpose of correcting an earlier one.

See printed record, p. 439.

THIRD.—When Pierre Chouteau, Jr., & Co., No. 2, dissolved, it was immediately succeeded by a new firm, formed of the three partners other than Sanford, to wit, Messrs. Chouteau, Sarpy and Sire. This concern prosecuted the old business for a considerable period. At the beginning of the business of firm No. 3, all the debts of the firm No. 2, of which Sanford had been a partner, and its credits as well, were transferred on the books of firm No. 2 to firm No. 3 as being the debts and credits of the latter mentioned firm. (See deposition of witness Nicholls, an expert accountant, printed record, pages 489 and 490.) The evidence of the witness upon this point is as follows:

"Q. The attention of the witness is called to Journal No. 6, of Pierre Chouteau, Jr., & Co., No. 2, folios 186 to 205 inclus-

ive, and he is asked if he has examined those in the course of the examination of the accounts. A. I have in a general way. Q. State whether those entries upon the folios named do not indicate that the balances of the accounts of firm No. 2, both debit and credit, were transferred into the accounts of firm No. 3, in detail, in the same manner as if the assets and liabilities of firm No. 2 were also assets and liabilities of firm No. 3? A. Yes, sir."

See printed record, pp. 789, 790.

FOURTH.—It is admitted that the debts existing against the St. Louis firm No. 2 at the time of its dissolution were afterwards paid by firm No. 3. This latter firm ceased to do business on January 1, 1856. It expired by limitation at that date. (Printed Record, pp. 322, 323.) It is claimed that for the purpose of enabling firm No. 3 to pay off the indebtedness of firm No. 2, Pierre Chouteau, Jr., himself advanced the money to firm No. 3. These debts having been paid before January 1, 1856, if Pierre Chouteau, Jr., in that manner had become the creditor of firm No. 2, then he must have become such creditor at some time prior to January 1, 1856, or at least a year prior to the death of John F. A. Sanford, which did not occur until the year 1857. Hence, Pierre Chouteau, Jr., became such creditor at least three years before his negotiations with Messrs. Gebhard and Barlow, which occurred after the death of Mr. Sanford, and in the year 1859. Now, under this state of things, if Sanford's interest in the Minnesota lands had not been free, and if Sanford had not been released from all liability to contribute towards the payment of the debts of the St. Louis firm No. 2, would not Pierre Chouteau, Jr., in his settlement with Messrs. Gebhard and Barlow, have brought forward a claim that Sanford's estate was indebted to him on account of advances made to pay off the debts mentioned? It is impossible to believe that he would not have done so. Yet there is not the slightest evidence that he ever brought such a claim forward. Mr. Barlow, in his testimony, gives a narrative of these negotiations, and so far as appears from his uncontradicted evidence upon this point, not a word of allusion was made throughout the negotiations to any indebtedness from Sanford to himself, arising out of the transactions of the St. Louis firm. It is hardly possible that Pierre Chouteau, Jr., could have remained so many years the

creditor of Sanford, without some demand having been made somewhere, and to the knowledge of somebody, for reimbursement. The fact that no such demand was made, but that, on the contrary, the entire indebtedness of firm No. 2 was at its dissolution transferred to the books of the new concern, formed of the remaining three partners, would of itself afford the strongest support for the correctness of Mr. Barlow's statement.

FIFTH.—If the circumstances of the dissolution were as contended for by Sanford's representatives, it might be expected that some entry would be found in the books of some of these concerns, distributing the deficiency of $212,724.23 among the three remaining partners; and such an entry is found in those books.

In Journal No. 3 of the firm of P. Chouteau, Jr., No. 3, is found the following entry:

"ST. LOUIS, May 1st, 1860.

SUNDRIES, *Dr.*

To PIERRE CHOUTEAU, JR., & Co., No. 2.

J. B. Sarpy, 17⅓ per cent. of balance due to date.....	$212,724 23	$36,872 19
J. A. Sire		36,872 19
P. Chouteau, Jr., balance.....		138,979 85"

See printed record, page 264, folio 518.

And again in the books of a still subsequent firm, Pierre Chouteau, Jr., & Co., No. 5, under date of July 1, 1862, we find the following entry:

"ST. LOUIS, July 31, 1862.

J. W. SIRE, *Dr.*

To P. CHOUTEAU, JR.

Proportion of J. A. Sire of amount due to J. F. A. Sanford to P. Chouteau, Jr., & Co, No. 3, viz.:		
Due to May 1, 1860.....	$36,872 19	
Interest to May 1, 1861.....	2,212 32	
	$39,084 51	
Interest to 31st December, 1861..	1,367 94	
		$40,452 45

Less 17½ per cent. interest of J. F. A. Sanford interest, $11,909,500. Balance of cash received by P. C. Jr., from sales of the Minnesota property		$2,064 35
		$38,388 10
26 per cent. due by J. A. Sire	$9,980 88	
Less J. A. Sire's 17⅓ per cent. under sales of the property	2,064 35	
	$7,616 53	

SIXTH.—Mr. Pierre Chouteau, Jr., in his lifetime, under his own hand and seal, solemnly admitted the existence of a *special* arrangement at the time of the dissolution of the St. Louis firm No. 2. It will be remembered that Mr. Barlow in his testimony, states that the negotiations between himself and his co-executor, upon the one part, and Mr. Pierre Chouteau, Jr., upon the other part, in the year 1859, resulted in a compromise, which was carried out by the execution of several instruments. Among these instruments was one executed by Mr. Chouteau under seal, releasing Sanford's executors from all liability and indebtedness of every nature. This release is quoted in the answers in the Minnesota suit, printed below. See pp. 26-27 of this brief.

The italicised passage towards the close of this instrument is very significant and conclusive. Such language could not have been used in the absence of some special arrangement for the disposition of the assets, and for the taking care of the debts of the St. Louis firm. It is to be remarked that this clause does not purport to confer any new rights upon Chouteau. It does not purport to give him anything that he had not before. It only preserves to him whatever rights already existed in his favor. The clause says, in so many words, that some specific understanding was had concerning the disposition of the assets in question, when the firm was dissolved. Now, if the theory of the appellants here be true, if Sanford did retire from the St. Louis firm merely upon the understanding that its affairs should be put into liquidation, leaving everything else concerning the rights and liabilities of the parties to be settled by the law, there certainly could have been no

agreement to apply any portion of the assets for the personal benefit of P. Chouteau, Jr. An agreement upon the dissolution that the assets of the firm should be applied for Mr. Chouteau's benefit, could only have been the result of the further understanding that he was to take care of the debts.

SEVENTH.—After the compromise of 1859 in New York, while Pierre Chouteau, Jr., himself was still living, he caused suit to be commenced in the State of Minnesota against Messrs. Gebhard and Barlow, as the executors and trustees of John F. A. Sanford's estate. In the complaint in this suit, the ownership by the firm of which Sanford had been a member of a large quantity of lands, embracing the very property in controversy in this litigation, was asserted. It was also asserted that the affiairs of that concern had never been finally settled; and a decree was prayed for the statement of an account, and for the application of the property in payment of the indebtedness of the firm. This complaint is found in the printed record on pp. 171–180.

This suit was begun in February, 1861. In the month of June of the same year Messrs. Gebhard and Barlow made, and jointly verified and served, an answer to that complaint, and in the month of September of the same year caused to be made and served an amended answer thereto. This original and the amended answer were in the following terms:

" DISTRICT COURT, SECOND JUDICIAL DISTRICT,

STATE OF MINNESOTA, COUNTY OF RAMSAY.

PIERRE CHOUTEAU, JUNIOR, AND and Pierre A. Berthold and Chouvin V. Le Beau, Executors, &c., of the Last Will and Testament of John B. Sarpy, deceased, and Joseph H. Conn, Surviving Executor, &c., of Joseph A. Sire, deceased,	Copy Answer.
VS.	
FREDERICK C. GEBHARD AND Samuel L. M. Barlow, Executors, &c., of John F. A. Sanford, deceased.	

The defendants answer the complaint as follows :

FIRST.—They admit the allegations of the first article of the complaint.

SECOND.—They admit that the business contemplated by said copartners was commenced and carried on by them.

THIRD.—They admit the allegations of the seventh clause of said complaint, except the allegation that the schedules A, B C and D annexed to the complaint are a correct description of said lands, and excepting the allegation that the share and interest of the said John F. A. Sanford in said property is partnership property, and excepting also the also the allegation as to the value of said lands, which these defendants are informed and believe is much greater than alleged in the complaint.

FOURTH.—These defendants admit that some claim has been made upon them since the death of said Sanford as for a contribution towards the payment of the debts of said firm, but aver that no accounts have been rendered or proofs or vouchers exhibited to them in support of any such claim.

FIFTH.—And these defendants admit the allegations of the

fourteenth article of said complaint, but aver that the will of the said John F. A. Sanford has not been proved, admitted to probate, or recorded in the State of Minnesota, nor have any letters testamentary been issued to them within that State.

SIXTH.—And the defendants, further answering, say that they have no knowledge nor information sufficient to form a belief of any of the allegations of said complaint, except in so far as the same are hereinbefore admitted or denied, and they therefore controvert each and every other allegation in said complaint contained.

SEVENTH.—And for a further and separate defense these defendants say, that the said John F. A. Sanford, at the time of his death left him surviving his widow, Isabel Sanford, and Benjamin Sanford and Amelia Chouteau Sanford, and John F. A. Sanford, his only children and heirs-at-law, all of whom are still living, to wit, the said Benjamin Sanford at St. Louis, in the State of Missouri, and the said widow and other children at Paris, in the Empire of France, and that the said John F. A. Sanford, as to the real estate described in said complaint, made no devise thereof which altered or affected the titles or interests of his said widow and children therein derived from him as declared by the law of descent, and that the said Benjamin Sanford has, since the death of the said John F. A. Sanford, released and quit-claimed to the said widow and other children all his right, title, and interest in the estate, real and personal, of his said father; and they deny, on information and belief, that the same is or was at the time of the commencement of this action partnership property; and they aver, as they are advised and believe, that the said Isabel Sanford, Amelia Chouteau Sanford, and John F. A. Sanford, the younger, are necessary parties defendant in this action, and that there is a defect of parties defendant therein.

EIGHTH.—And for a further and separate defense these defendants say, upon information and belief, that upon the retirement of the said John F. A. Sanford from the firm mentioned in the complaint, he became a partner in another firm under the same name in the City of New York, together with the said Pierre Chouteau, Junior, in which the said Sarpy and said Sire had been theretofore partners, and in which they thereupon ceased to be partners, and said John F. A. Sanford succeeded to their interests therein, and said Sarpy and Sire succeeded to his interests in said St. Louis firm, excepting his interest in said Minnesota lands, and that by agreement between all the parties at the time of such exchange of interests, and in consideration thereof, said John F. A. Sanford and his interest in the Minnesota lands were to be exonerated and free from all liability for the debts and liabili-

ties of said St. Louis firm or to any of his copartners therein, and to be indemnified and saved harmless in the premises.

NINTH.—And for a further and separate defense, the said defendants say, that, on or about the first day of December, in the year 1859, the said Pierre Chouteau, Junior, executed and delivered unto these defendants a certain release, under his hand and seal, of the tenor and effect following, that is to say:

To all to whom these presents shall come or may concern, greeting: "Know ye, that I, Pierre Chouteau, Jr., of Saint Louis, in the State of Missouri, for and in consideration of the sum of one dollar, lawful money of the United States of America, to me in hand paid by Samuel L. M. Barlow and Frederick C. Gebhard, of the City of New York, executors of the last will and testament of John F. A. Sanford, late of said city, deceased; and in further consideration of an assignment and transfer of the interest of the said John F. A. Sanford, deceased, in the copartnership assets of the late firms of P. Chouteau, Jr., & Co., and P. Chouteau, Jr, Sanford & Co., executed and delivered to me by said executors, cotemporaneously with the execution and delivery hereof by virtue of an order of the Surrogate of the County of New York, made in the matter of the estate of John F. A. Sanford, deceased, and bearing date the twenty-fifth day of November, in the year one thousand eight hundred and fifty-nine, have remised, released, and forever discharged, and by these presents do, for myself, my heirs, executors, and administrators, remise, release, and forever discharge the said executors and the said estate of the said testator, and his heirs, next of kin, devisees, and legatees, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever in law or in equity which against the said John F. A. Sanford, or them, or any or either of them, I ever had, now have, or which I or my heirs, executors or administrators, hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents, and particularly upon or by reason of the partnership accounts of the late firm of P. Chouteau, Junior, & Co., of the City of New York, which firm was composed of myself and the said John F. A. Sanford. And I do hereby, for the considerations aforesaid, covenant and agree with the said Samuel L. M. Barlow, and Frederick C. Gebhard, executors as aforesaid, well and truly to indemnify same, and keep harmless them and each of them as such executors, and individually, and the estate of the said

John F. A. Sanford, deceased, his devisees, legatees, heirs, and next of kin, of and from all and all manner of liability, recoveries, costs, charges, expenses, claims, and demands for, on account, or by reason of any of the copartnership debts or liabilities of the late firms or copartnerships of the P. Chouteau, Junior, Sanford & Co., and P. Chouteau, Junior, & Co., of the City of New York, and of each of said firms or copartnerships. *Nothing herein contained is to affect the rights which the said Pierre Chouteau, Junior, now has, either as surviving partner or by assignment, to collect all the assets of any firm formerly existing at St. Louis, in the State of Missouri, in which the said John F. A. Sanford was formerly a partner, for his own sole use and benefit, according to the terms agreed upon on the retirement of said John F. A. Sandford from said firms, or to affect or impair the right of the said Pierre Chouteau, Junior, to said assets.* And I do hereby covenant and agree with the said Frederick C. Gebhard and Samuel L. M. Barlow, executors as aforesaid, that I have good right and lawful authority to release and discharge in manner aforesaid.

In witness whereof, I have hereunto set my hand and seal, the first day of December, in the year of our Lord one thousand eight hundred and fifty-nine.

PR. CHOUTEAU, JR. [L. S.]

Sealed and delivered in the presence of }

WM. MAFFITT.
JOEL G. HARPER.

As by the said release in the possession of these defendants, and ready to be produced as the court shall direct, will more fully appear.

And these defendants, further answering, say, upon information and belief, that at the time of the execution and delivery of said release, said Pierre Chouteau, Junior, was the owner, either in his own right or by assignment from the said John B. Sarpy and Joseph A. Sire, or their respective executors, of the claims and demands in prosecution in this action.

STATE OF NEW YORK, City and County of New York, } ss.:

FREDERICK C. GEBHARD and SAMUEL L. M. BARLOW, above named defendants, being duly sworn, each for himself, did depose and say: That the foregoing answer is true of his own knowledge, except as to the matters therein stated on infor-

mation and belief, and that as to those matters he believes it to be true.

FREDERICK C. GEBHARD,
Ex'r, &c.
SAMUEL L. M. BARLOW,
Ex'r, &c.

Sworn before me, this 15th day of June, 1861,
EDWARD W. COLLIN,
Notary Public,
State of New York.

DISTRICT COURT, SECOND DISTRICT,

STATE OF MINNESOTA, COUNTY OF RAMSEY.

PIERRE CHOUTEAU, JUNIOR, AND Pierre A. Berthold and Chauvin V. Le Bean, Executors, &c., of the last will and testament of John B. Sarpy, de eased. and Joseph Conn, surviving Executor, &c., of Joseph A. Sire, deceased,	Copy Amended Answer.
AGAINST	
FREDERICK C. GEBHARD AND SAMUEL L. M. BARLOW, Executors, &c., of John F. A. Sanford, deceased.	

The amended answer of the defendants to the complaint of the plaintiffs in the foregoing and above entitled action respectfully shows to this court and states:

FIRST.—That the defendants admit the allegations of the first article of the complaint.

SECOND.—They admit that the business contemplated by said copartners was commenced and carried on by them.

THIRD.—They admit the allegations of the seventh clause of the complaint, except the allegation that the schedules A, B, C, and D, annexed to the

complaint, are a correct description of said lands, and excepting the allegation that the share and interest of the said John F. A. Sanford in said property is partnership property, and excepting also the allegation as to the value of said lands, which these defendants are informed and believe is much greater than alleged in said complaint.

FOURTH.—These defendants admit that some claim has been made upon them since the death of said Sanford, as for a contribution towards the payment of the debts of said firm, but that no accounts have been rendered, or proofs or vouchers submitted or exhibited to them, in support of any such claim.

FIFTH.—And these defendants admit the allegations of the fourteenth article of said complaint, but aver that the will of said John F. A. Sanford has not been proved or admitted to probate or recorded in the State of Minnesota, nor have any letters testamentary been issued to them within that State.

SIXTH.—And these defendants, further answering, say that they have no knowledge or information sufficient to form a belief of any of the allegations of said complaint, except in so far as the same are hereinbefore admitted or denied; and they therefore controvert each and every other allegation in said complaint contained.

SEVENTH.—And for a further and separate defense, these defendants say that the said John F. A. Sanford, at the time of his death, left him surviving his widow, Isabel Sanford, and Benjamin Sanford and Amelia Choteau Sanford and John F. A. Sanford, his only children and heirs at law, all of whom are still living, to wit, the said Benjamin Sanford at St. Louis, in the State of Missouri, and the said widow and other children at Paris, in the Empire of France; and that the said John F. A. Sanford, as to the said real estate described in said complaint, made no devise thereof which altered or affected the titles or interests of his said widow and children therein derived from him, as declared by the law of descent; and that the said Benjamin Sanford has, since the death of the said John F. A. Sanford, released and quitclaimed to the said widow and other children all his right, title and interest in the estate, real and personal, of his said father; and they deny on information and belief that the same is or was, at the time of the commencement of this action, partnership property; and they aver, as they are advised and believe, that the said Isabel Sanford, Amelia Chouteau Sanford, and John F. A. Sanford the younger are necessary parties defendant in this action, and that there is a defect of the parties defendant therein.

EIGHTH.—And for a further and separate defense these defendants say, that upon the retirement of the said John F. A.

Sanford from the firm mentioned in the complaint, became a partner in another firm under the same name in the City of New York, together with the said Pierre Chouteau, junior, in which the said Sarpy and Sire had been theretofore parties and in which they thereupon ceased to be partners, and said John F. A. Sanford succeeded to their interests therein, and said Sarpy and Sire succeeded to his interest in said St. Louis firm, excepting his interest in said Minnesota lands, and that by agreement between all the parties at the time of such exchange of interest, and in consideration thereof said John F. A. Sanford and his interest in the Minnesota lands were to be exonerated and free from all liability for the debts and liabilities of said St. Louis firm, or to any of his copartners therein, and to be indemnified and saved harmless in the premises, and that the said John F. A. Sanford was to have and to hold in fee simple as tenant in common seventeen and one-third one-hundredths ($17\frac{1}{3}$-100) parts of said land to his own sole use, freed from any claim for debts of said copartnership, or any liability for contribution in favor of any of the other partners.

NINTH.—And for a further and separate defense, the said defendants say that on or about the first day of December, in the year one thousand eight hundred and fifty-nine, the said Pierre Chouteau, Jr., executed and delivered unto these defendants a certain release under his hand and seal, of the tenor and effect following, that is to say:

To all to whom these presents shall come or may concern, greeting: Know ye that I, Pierre Chouteau. Jr., of St. Louis, in the State of Missouri, for and in consideration of the sum of one dollar, lawful money of the United States of America, to me in hand paid by Samuel L. M. Barlow and Frederick C. Gebhard, of the City of New York, executors of the last will and testament of John F. A. Sanford, late of said city, deceased, and in further consideration of an assignment and transfer of the interest of the said John F. A. Sanford, deceased, in the copartnership assets of the late firms of Pierre Chouteau, Jr., & Company, and P. Chouteau, Jr., Sanford & Company, executed and delivered to me by said executors cotemporaneously with the execution and delivery hereof, by virtue of an order of the Surrogate of the County of New York, made in the matter of the estate of John F. A. Sanford, deceased, and bearing date the twenty-fifth day of November, in the year one thousand eight hundred and fifty-nine, have released, remised and forever discharged, and by these presents do, for myself, my heirs, executors, and administrators, remise, release, and forever discharge the said executors and the estate of the said testator, and his heirs, next of kin, devisees and legatees, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties,

covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against the said John F. A. Sanford, or them or any or either of them, I ever had, now have, or which I or my heirs, executors, or administrators hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and particularly upon or by reason of the partnership accounts of the late firm of P. Chouteau, Jr., & Company, of the City of New York, which firm was composed of myself and the said John F. A. Sanford. And I do hereby, for the considerations aforesaid, covenant and agree with the said Samuel L. M. Barlow and Frederick C. Gebhard, executors as aforesaid, well and truly to indemnify and keep harmless them, and each of them, as such executors, and individually, and the estate of the said John F. A. Sanford, deceased, his devisees, legatees, heirs and next of kin, of and from all and all manner of liability, recoveries, costs, charges, expenses, claims and demands for, on account of, or by reason of any of the copartnership debts or liabilities of the late firms or copartnership of P. Chouteau, Jr., Sanford & Co., and P. Chouteau, Jr., & Co., of the City of New York, and of each of said firms or copartnerships; *nothing herein contained is to affect the rights which the said Pierre Chouteau, Jr., now has, either as surviving partner or by assignment, to collect all the assets of any firm formerly existing at St. Louis, in the State of Missouri, in which the said John F. A. Sanford was formerly a partner, for his own sole use and benefit, according to the terms agreed upon on the retirement of said John F. A. Sanford from said firms, or to affect or impair the right of the said Pierre Chouteau, Jr., to said assets.* And I do hereby covenant and agree with the said Frederick C. Gebhard and Samuel L. M. Barlow, executors as aforesaid, that I have good right and lawful authority to release and discharge in manner aforesaid.

In witness whereof, I have hereunto set my hand and seal the first day of December, in the year of our Lord one thousand eight hundred and fifty-nine.

PR. CHOUTEAU, JR. [L. S.]

Sealed and delivered in presence of—
WM. MAFFITT,
JOEL G. HARPER.

As by the said release in the possession of these defendants, and ready to be produced as the court shall direct, will more fully appear. And these defendants, further answering, say that at the time of the execution and delivery of said release said Pierre Chouteau, Jr., was the owner either in his own

right or by assignment from the said John B. Sarpy and Joseph A. Sire, or their respective executors, of the claims and demands in prosecution of this action. And the amended answer of these defendants further shows and states that they are informed and believe that the said John F. A. Sanford at the time of his decease was entitled to an estate in fee simple absolute in seventeen and one-third one-hundredths part of said land described in said complaint, and was entitled to a conveyance thereof from the said Pierre Chouteau, Jr., and that the said Amelia Chouteau Sanford, John F. A. Sanford, his children, and Isabel Sanford, his widow, have now the same interest in said lands, and that said Pierre Chouteau, Jr., holds said seventeen and one-third one-hundredths part of said lands as trustee for the benefit of said widow and children, and that said Pierre Chouteau, Jr., as to the rest of said lands holds the same for his own sole benefit. That these defendants are advised and do respectfully insist that they are entitled to the judgment of this court declaring said Pierre Chouteau, Jr., such trustee, and that said lands be partitioned, and that $17\frac{1}{3}$-100 part thereof be set off to the said widow and children of said John F. A. Sanford, according to their respective rights and interest therein, and that said Chouteau be adjudged to execute all proper conveyances there for to said widow and children of said John F. A. Sanford.

Wherefore, these defendants pray the affirmative relief and judgment of this court:

1st. That said Pierre Chouteau, Jr., hold seventeen and $\frac{1}{3}$-100 parts of said land for the use and benefit of said Amelia Chouteau Sanford and John F. A. Sanford, Jr., in fee, and of the said Isabella Sanford, widow, according to her interest therein.

2d. That said lands may be partitioned and divided between said Amelia Chouteau Sanford and John F. A. Sanford and said Isabella Sanford and said Pierre Chouteau, Jr., as their respective rights and interests therein may appear.

3d. That in said partition, the said Pierre Chouteau, Jr., be directed and adjudged to make and execute all necessary conveyances and assurances in and to the land, for the effectual vesting in the said Amelia Chouteau Sanford and John F. A. Sandford and Isabella Sanford their shares of said land according as their respective rights and interests therein may be adjudged by this court.

4th. That said Pierre Chouteau, Jr., may be enjoined and restrained by this court from selling, mortgaging, leasing, or otherwise conveying or incumbering in any manner said lands, or any part thereof, and that in the meantime, and until the judgment of this court, said Pierre Chouteau, Jr., be so enjoined and restrained.

5th. That these defendants may have such other and further relief as may be agreeable to equity and good conscience.

SANBORN & LUND,
Defts.' Attorneys."

See printed record, pp. 180–188.

It will be perceived that both the original and amended answer distinctly and categorically assert the existence of the contract set out in the bill of complaint in this suit. Shortly after the service of these answers, a reply thereto was served, but the case was very soon dropped and discontinued by the plaintiffs therein. A copy of this reply is to be found in the printed record, on pages 188 and 189.

This conduct on the part of Mr. Chouteau, then the only surviving member of the St. Louis firm, in discontinuing the suit brought by him after the answer and amended answer of the defendant had come in, cannot be explained in any other way than as being a *confession* of the truthfulness of the claim which the answer set up. It cannot for a moment be presumed that Mr. Chouteau would have dismissed the suit had he not been conscious that the answer set forfh a defense incapable of refutation. He certainly would not have shrunk from a judicial investigation of the claim had it not been founded in fact. Messrs. Gebhard and Barlow distinctly asserted that Sanford's legal representatives were entitled to $17\frac{1}{3}$ one-hundredths part of all the Minnesota lands, free and clear of indebtedness. Mr. Chouteau would undoubtedly have been desirous of refuting this claim then and there, if he had not known it to be founded in right. Men are not in the habit of declining to contest unfounded claims to their valuable property, but on the contrary, are always anxious to have such claims examined into and exploded at the earliest possible moment; and such views would have been particulaly urgent upon Mr. Chouteau under the circumstances. He was the only living being who had participated in the arrangements forming the contract of dissolution of the St. Louis firm. Sanford, Sarpy, and Sire, in turn had passed away. He alone could speak from direct knowledge of the facts. Hence, it may be safely assumed that nothing short of a consciousness of the truth of these facts could have induced him to avoid meeting an issue so necessary to be disposed of while he should still be living and capable of giving evidence.

II.

Counsel for the respondents seek to escape from the crushing force of Mr. Barlow's evidence by interposing sundry objections, both to the effect and competency thereof; but all these objections may be disposed of short in terms.

FIRST.—It is said that Mr. Barlow gave his evidence many years after having seen the documents concerning which he testifies.

It is true Mr. Barlow gave his testimony in this suit in 1876, while he admits not having seen the correspondence, whose substance he details, since some time in the year 1861. Fifteen years form a considerable space of time; and if nothing had existed to give support to Mr. Barlow's memory, it might reasonably be doubted whether a man full of affairs, as he has been, could be expected to accurately narrate the contents of the letters in question. But, fortunately for the ends of justice in this case, the substance of those documents was crystallized in the answer and amended answer to the suits in Minnesota in 1861. It will be observed that both Mr. Gebhard and Mr. Barlow verified the original answer. Mr. Barlow recollects to have seen the instruments in question at the time this answer was prepared, and also that the answer stated the substance of the arrangement correctly. Hence, during all these years Mr. Barlow has not been compelled to rely upon his memory for the substance of the agreement in question. Having caused that substance to be placed upon record, he has never since had any other task to perform, under circumstances requiring this arrangement to be recalled to his memory, than to resort to that record. Hence, any objection founded upon the passage of time is of no more weight in this instance than it would be in any other of the cases frequently occurring where men have made memoranda of events, and resorted to them afterwards for the purpose of refreshing their memories. Under well-established rules of evidence, no more is necessary to entitle the evidence of a witness to credit than knowledge and recollection on his part that at some previous time, when the facts were fresh in his memory, he caused a correct memorandum of those facts to be made, which he now produces.

SECOND.—It is also claimed that the testimony of Mr. Barlow, giving the contents of those instruments is secondary evidence, and that a sufficient foundation for its reception was not laid by these respondents. There are several answers to this proposition, either of which would be entirely sufficient to dispose of it. The objection is that it was not proven that a sufficient search had been made for the missing papers to legally prove their loss. In the first place this is unfounded in fact. The evidence of Mr. Barlow shows that an honest and thorough search had been made. The facts which he narrates, touching the search, would convince any reasonable mind that the instruments were not being suppressed or kept out of court, but that an honest and exhaustive effort had been made to produce the originals. It certainly is not hinted that such documents actually existed anywhere, or have existed anywhere since this suit began. On the contrary, the whole burden which the appellants have taken upon themselves from the outset has been to establish the fact that no such documents have ever existed at any time or place. Now when men come into court and found their case upon the proposition that certain documents never existed, and a witness testifies that they have existed, but that after reasonable search he is at present unable to find them, it hardly comes with grace from such litigants to object that the search has not been as thorough as it ought to have been.

But this objection is more effectually disposed of by another consideration. No such objection was raised in the court below; on the contrary, the deposition of Mr. Barlow was read at the hearing without the slightest objection having been interposed to any part of it. Had it been the purpose of the respondents to make such an objection to the evidence, it was their duty to make it, and to make it to the courts, either before or at the hearing of the suit in the court below. Yet the record is silent as to the slightest objection upon the grounds mentioned, having been hinted at in the court below at any stage of the proceedings. When the deposition was being taken before the Examiner, some objections were suggested by counsel for the respondents, and noted upon the deposition by the Examiner; but such objections were founded upon totally different grounds, and neither

of these grounds was at all urged, or even mentioned, at the hearing. One of these objections noted was that sufficient notice had not been given at the time of the taking of the deposition to produce the documents in question; but the ground of this objection, if any existed, was entirely removed by a subsequent notice given long before the hearing, and which is to be found in the printed record on page 264.

The respondents, after the making by the court of its interlocutory decree, filed an elaborate list of exceptions thereto; but not a word of objection is contained therein against the action of the court in treating the testimony of Mr. Barlow as competent evidence of the existence and contents of the missing documents.

See printed record, pp. 28–32.

The evidence having gone into the case without objection, the respondents cannot now have it expunged from the record. It is well established practice in this court that appeals in suits in equity are to be heard upon the same evidence as that used in the court below.

Blease v. *Garlington*, 92, *U. S. I.*
Clements vs. *Moore*, 6 *Wall.*, 499.
Nat. Bank vs. *Ins. Co.*, 104 *U. S.*, 77.

Certainly, evidence which has been admitted and read without objection in the court of original jurisdiction, cannot be thrown overboard here, if that rule is to apply.

THIRD.—It is also claimed that Mr. Barlow's statements upon the subject of the alleged agreement, have not always been consistent; and the specification under this general charge is the alleged failure to set forth the agreement in a suit begun by Mr. Barlow as sole surviving executor, against Messrs. Charles P. Chouteau and others in the City of New York, in 1869; but an examination of the complaint in that case will show that this charge of inconsistency is wholly groundless. That complaint was as follows :

"NEW YORK SUPREME COURT.

SAMUEL L. M. BARLOW, SOLE Surviving Executor of John F. A. Sanford, deceased, as such Executor,

Plaintiff,

AGAINST

CHARLES P. CHOUTEAU, LEWIS V. BOGY and Edward P. Tesson, Executors of Pierre Chouteau, Junior, deseased, as such Executors,

Defendants.

TRIAL TO BE HAD IN THE CITY AND COUNTY OF NEW YORK.

The above named plaintiff complains of the above named defendants, and says:

FIRST.—That in the year one thousand eight hundred and forty-two, Pierre Chouteau, Jr., John B. Sarpy, Joseph A. Sire and John F. A. Sanford, formed and entered into a copartnership, under the name and style of P. Chouteau, Jr., & Co., for the purpose of carrying on a general trading and mercantile business at St. Louis, in the State of Missouri, and St. Paul, in the then territory of Minnesota, as their principal places of business; that at the formation of the said coparnership the respective shares of the partners in the capital and in the profit and loss of the firm was as follows:

Pierre Chouteau, Jr., 58-100; John B. Sarpy and John F. A. Sanford, each 16-100, and Joseph A. Sire 10-100, and so remained until some time in the year one thousand eight hundred and forty-nine, when the respective shares of the said copartners in the capital and profit and loss of the firm were changed as follows: The share of the said Pierre Chouteau, Jr., was reduced to forty-eight one hundredths, and the shares of John B. Sarpy, Joseph A. Sire and John F. A. Sanford were respectively increased to 17⅓-100, and so continued until the dissolution of said copartnership, by mutual consent, in the year one thousand eight hundred and fifty-two.

SECOND.—The plaintiff further says, that each and all of said copartners have deceased since the dissolution of said firm, and that said Sanford deceased at New York on or about the 5th day of May, 1859, leaving a last will and testament, of which the plaintiff is sole surviving executor, and, as the plaintiff is informed and believes, all the accounts and affairs of the said copartnership have been fully adjusted and settled, except as between the plaintiff, as executor of said Sanford, and the defendants, as executors of said Pierre Chouteau, Jr., and also as between said plaintiff and the defendants, except as to the premises hereinafter set forth, and therefore the plaintiff is advised that the respective personal representatives of the other partners deceased are not necessary parties to this suit.

THIRD.—The plaintiff further says that during the continuance of the said copartnership, the said firm purchased, with the funds thereof, and for the benefit of the firm in the several proportions above mentioned, large tracts of land in the State of Minnesota, the legal title to all of which was, for the sake of convenience, taken in the name of Pierre Chouteau, Jr., of which said lands a description was furnished by the said Pierre Chouteau, Jr., in his lifetime, a copy whereof is hereto annexed, marked Schedule "A," and made part of this complaint. But whether the said schedule contains a true and full description of all of said lands this plaintiff does not know, and has no means of ascertaining, and, therefore, this plaintiff prays that the defendants, who have full knowledge in the premises, may be required to set forth and prove the truth in this behalf.

FOURTH.—The plaintiff further says, that from time to time in his lifetime, the said Pierre Chouteau, Jr., sold and conveyed and converted into money a large portion of the said lands, but to whom, what portion, and the amount of money realized therefrom, this plaintiff does not know, and has no means of ascertaining. That the defendants, as his executors, have, since his decease, also sold and conveyed and converted into money other large portions of the said land, but to whom, what portion, and the amount of money realized therefrom, this plaintiff does not know, and has no means of ascertaining. That a large portion of the said lands still remain unsold, as the plaintiff is informed and believes, the title to which still stands in the name of the said Pierre Chouteau, Jr., and which has never been divided, but how much of said land still remains unsold this plaintiff does not know. But the defendants have full and accurate knowledge of the premises in this paragraph set forth, and this plaintiff therefore prays that they may be required to set forth and prove the truth in this behalf.

FIFTH.—The plaintiff further says, that during the lifetime of the said John F. A. Sandford, no account was stated or adjusted with him by the said Pierre Chouteau, Jr., who survived him, in respect to said lands sold, as the plaintiff is informed and believes, nor were any part of the proceeds thereof at any time paid to him, nor has any account in respect thereof been stated or adjusted with the plaintiff as executor of said Sandford since his decease, either by the said Pierre Chouteau, Jr., or the defendants, his personal representatives.

SIXTH.—The plaintiff further says, that, as the executor as aforesaid of the said John F. A. Sandford, he is entitled to his due share of the proceeds of the said land so sold and conveyed as aforesaid, which share is the proportion thereof in which the said Sandford was interested in the said firm of P. Chouteau, Jr., & Co., as hereinbefore set forth, and that as to the said lands remaining unsold the plaintiff, as executor as aforesaid, is entitled to have his due proportion declared and conveyed to him.

The plaintiff therefore prays—

FIRST.—That an account may be taken of all the lands acquired by the said firm during its continuance, the legal title to which was taken in the name of the said P. Chouteau, Jr.

SECOND.—That the defendants may be required to account, and that an account may be taken of all of the aforesaid lands sold either by the said P. Chouteau, Jr., in his lifetime, or the defendants, or any of them, since his decease, and of the sums of money received therefor, and that the plaintiff's due proportion of such proceeds may be ascertained, declared and adjudged to be paid over to him with interest.

THIRD.—That the amount and description of the lands remaining unsold may be ascertained and declared, and that the defendants be directed and required, by a proper order, to convey to the plaintiff his just undivided portion thereof.

FOURTH.—That the plaintiff may have such other and further relief as may be just and equitable.

W. W. MACFARLAND,
Plaintiff's Attorney,
35 William st., N. Y."

It is true that the existence of the agreement was not set out in direct terms. It was not necessary that it should be. But averments were made in that complaint, evidently founded upon the existence of the contract, and which could neither have been true, nor have been proven except by making out the existence of such an arrangement. For instance, subdivision 2 expressly

avers that all matters relating to the St. Louis partnership have been adjusted, save as to the Minnesota lands; while subdivision 6 positively asserts that the interest which Mr. Sanford became entitled to in the Minnesota property was $17\frac{1}{3}$ one-hundredth parts of the same, absolutely. Now, these two averments could not have been true, unless such an arrangement as these respondents contend for, had been entered into. It is true the pleader might have set forth the arrangement in express terms, but he was not required to do so. All he was required to do was to set forth the facts according to their legal effect. All he was required to do was what he did do; and when it came to the evidence, the averments which he thus inserted would be established as matters of fact by the proof of the agreement in question. Hence, the criticism of inconsistency in so far as it is founded upon anything contained in the complaint in the New York suit, is shown to be wholly unjustifiable.

III.

To meet the evidence produced by the respondents, the appellants have nothing whatever. They produced as a witness Mr. Charles P. Chouteau, one of the defendants in this suit. He was examined at great length, but, probably, owing to the fact that he neither had any knowledge, nor any means of knowledge, concerning the important facts, his testimony is of not the slightest consequence upon the main point. He was not a member of the firm. He was merely employed for a period as its purchasing agent; and his duties as such, according to his own statement, lay at points remote from that where the partners resided and carried on their main business operations. Nothing could better exemplify Mr. Chouteau's entire ignorance of the situation than the statement in his evidence to the effect that he had never heard of the claim set up in this litigation by the respondents, touching the existence of a special agreement at the dissolution of the St. Louis firm, until after the beginning of the present suit. Had he been at all conversant with the important facts concerning the business of Pierre

Chouteau, Jr., & Co., No. 2, of St. Louis, he would have known of the suit begun by his father in Minnesota, in 1861, and of the answers by Messrs. Gebhard and Barlow averring the existence of such a contract.

IV.

Some contention is made by the appellants that the respondents have been guilty of such *laches* in the assertion of their rights, that a court of equity will on that account deny them the relief sought by this litigation. But slight reflection upon the events as they have occurred will convince one of the preposterousness of this claim. The Statute of the State of Minnesota fixes the period of limitation for the bringing of actions at law to recover legal interests in lands, at twenty years after the beginning of adverse possession. It is confidently believed by counsel for respondents that no different period of limitation is or ought to be recognized for the assertion of equitable interests in real property lying in that State. But the period of adverse claim in this case has not even been half of twenty years, if there has ever been such adverse claim at all.

This property was originally conveyed to the firm of Pierre Chouteau, Jr., & Co., No. 2, in 1852, and subsequent years, under the designation of "P. Chouteau, Junior and Company." The effect of this was undoubtedly to confer a legal title upon Pierre Chouteau himself, as trustee for himself and the other members of the firm. P. Chouteau, Junior, himself, died in the year 1865, leaving the property here in contention with the title unchanged. The effect of his death, under the circumstances, was that the legal title to the property, burdened with the trusts in favor of his copartners, including Sanford, passed to his heirs, Mr. Charles P. Chouteau and Miss Julia Maffit. These latter held merely as trustees. No part of the authority that Pierre Chouteau, Junior, himself, may be deemed to have been entitled to, of disposing of the lands for the purpose of winding up the copartnership, descended to his heirs. The

heirs could only procure a disposition of the property which would be binding upon the beneficiaries for whom they held the legal title, by judicial proceedings; and it is not claimed that any such proceedings were ever instituted by either of them. In 1866 and 1867, Charles P. Chouteau, and his sister, Mrs. Maffit, for the avowed purpose of winding up the partnership affairs of their father and his copartners, put up all of the Minnesota property at auction sale, having first given notice to Mr. Barlow, as the legal representative of the Sanford interest, of the time and place of sale. At these sales a part of the property was struck off to third persons, and conveyances were made to them by Chouteau and Maffit, but the great bulk of the property, in value at least, was formally struck off to Chouteau and Maffit, and the heirs and legal representatives of the other two partners, Sarpy and Sire. Of course, this sale was the merest empty form. It is possible for a Court of Equity, or for a Legislature, to empower a trustee to bid in the property at a trust sale for his own benefit; but in the absence of such judicial or legislative authority, any attempt of a trustee, whether by public or private sale, to transfer the property to himself, amounts to nothing whatever. Hence the appellants in this case, possessing as they do, and have done, the very real estate which is here in litigation, have never been discharged of the trust originally assumed. The partnership has never been wound up, but the partnership property exists in specie, and in the hands of the respondents, as it did twenty or ten years ago. Nothing further need be said on this point to entirely dispose of it; but much more remains capable of being said. During all these years the representatives of Sanford have been constantly asserting their rights. They began to assert them judicially as early as the year 1861. They asserted them in that year by the answers in the Minnesota suit, dismissed by Mr. Chouteau himself. They again asserted them in the suit brought in the City of New York in 1869, and which remained pending till 1876, and the present suit was brought in the last-named year. So far, therefore, from there having been any neglect on the part of these respondents to assert their rights in a court of justice, they have been constantly asserting them in the courts for the past twenty years.

It cannot be claimed that the appellants have denied to the Sanfords the possession of *some* interest in this property unless it has been done since the sales of 1867. Certainly up to that time they constantly recognized the existence of such an interest in numerous ways. Hence, if the Statute of Limitations could be deemed to run at all in the case of a trust so long as any of the trust estate can be found in the hands of the trustee in specie, it could only be considered as beginning to run from the time of the denial of all interest in the beneficiary by the trustee; and as no such denial ever occurred in this case prior to the sales of 1866 and 1867. Certainly not more than ten years of such a state of things existed in this case prior to the beginning of the present suit, and for seven of those ten years a suit having similar purposes, and between the same parties, was going on in the courts of New York.

V.

It is also said that the property described in the bill of complaint, in part at least, did not form a portion of the assets of Pierre Chouteau, Jr., & Co., No. 2, at the time of the dissolution of that firm. This contention must have resulted from great carelessness in reading the evidence. The fact that all of it *did* belong to that concern at the time of dissolution is clearly proven by the record in the suit begun in the year 1861 in the State of Minnesota before referred to. The complaint in that suit has annexed schedules of the property, which the complaint asserts to have belonged to that concern. These schedules are to be found in the printed record on pages 176, 177 and 178. A notice of *lis pendens* was filed in the office of the Register of Deeds by the plaintiffs in that suit simultaneously with the bringing of it, in accordance with the statutes of Minnesota, and the practice of its courts. That notice had identical schedules annexed to it, the same being found in the printed record on pages 236 to 239, inclusive. Now the property embraced in this litigation forms part of the very property contained in the schedules referred to. Certainly no further